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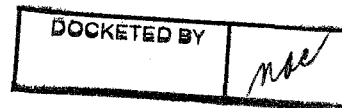
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December 19, 2001

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1200 W. Washington
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Arizona Corporation Commission
DOCKETED

DEC 19 2001



Re: Arizona Public Service Company
Docket No. E-01345A-01-0822

Dear Ms. Cole:

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of the Brief on Procedural Issues and Requirements by Sempra Energy Resources. I have also enclosed two copies to be conformed and returned to our office in the enclosed self-addressed stamped envelope.

Please let me know if you have any questions, and thank you for your assistance.

Sincerely,

Lawrence V. Robertson, Jr.
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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE ARIZONA) Docket No. E-01345A-01-0822
PUBLIC SERVICE COMPANY'S)
REQUEST FOR A VARIANCE OF) BRIEF ON PROCEDURAL ISSUES AND
CERTAIN REQUIREMENTS OF A.C.C.) REQUIREMENTS
R14-2-1606)
_____)

I.

INTRODUCTION

Pursuant to the Procedural Order issued on December 11, 2001 by the Chief Administrative
Law Judge, Sempra Energy Resources ("Sempra") hereby submits its brief

"addressing the appropriate procedural¹ mechanism for the
Commission's consideration of this (APS's) requested variance and
whether and what additional due process requirements are needed. ..."
[Procedural Order at page 1, lines 25-27]

¹ As noted in the title, Sempra's brief is confined to a discussion of procedural matters. Sempra will address the merits of APS's Request for Variance, and related substantive issues, once the appropriate proceeding(s) for such purpose has/have been determined.

II.

DISCUSSION

In the interest of brevity, Sempra hereby adopts and incorporates herein by reference the discussion and citation of authorities set forth in the legal brief being filed by the Arizona Competitive Power Alliance ("Alliance") pursuant to the above-cited portion of the December 11, 2001 Procedural Order. In addition, Sempra makes the following observations.

A. **The Commission Lacks Authority To Grant The Variance On The Basis Cited and Relied Upon By APS.**

In its November 26, 2001 Reply to the November 16, 2001 Response of the Arizona Corporation Commission Staff, Arizona Public Service Company ("APS") expressly states that

APS sought only a variance to one subsection of one of the Arizona Corporation Commission's 17 electric competition rules . . . The Company's request is specifically authorized by A.A.C. R14-2-1614(C)" [APS Reply at page 2, lines 16-17 and 20-21, respectively.] [Emphasis added]

APS is in error, both factually and legally, in its assertions. As a consequence, its procedural posture is analogous to the proverbial saying that

" . . . you can't get there from here. . . "

More specifically, as the Alliance's Brief and the Staff's November 16, 2001 Response discuss, and as several parties noted during oral remarks at the December 5, 2001 Procedural Conference, APS cannot achieve the underlying goal of its Request for Variance without (i) an amendment to the Settlement Agreement and Addendum and (ii) an amendment to or rescission of

1 the Commission's Decision No. 61973.² The granting of a variance alone will not suffice. Rather,
2 APS must first negotiate the necessary amendment of the Settlement Agreement and Addendum with
3 the signatory parties. Thereafter, if successful, it must seek a Commission decision approving the
4 negotiated changes, and rescinding, altering or amending Decision No. 61973 pursuant to A.R.S. §
5 40-252. Moreover, the opportunity for intervention and participation in such a proceeding must first
6 be afforded to any person who might be "directly and substantially affected" by the proceeding and
7 any resulting decision. [A.A.C. R14-3-105]
8
9

10 Thus, setting aside the question of whether the nature and effect of APS's request is
11 consistent with the language and intent of the Commission's procedures for variations or exemptions
12 from the Commission's Retail Electric Competition Rules, APS has quite simply failed to invoke
13 and satisfy the requisite jurisdictional and procedural predicates to a realization of its goal.³ Those
14 are pre-requisites that cannot be "waived" or made the subject of a variance or exemption by either
15 APS or the Commission. The signatory parties to the Settlement Agreement and the Addendum, and
16 persons who could be directly and substantially affected by Commission approval of any amendment
17 thereof, have certain legal rights which must be recognized and protected.
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22

23 ² In the prepared testimony filed on December 12, 2001, APS endeavors to suggest there is no linkage between
24 Decision No. 61973 and the Addendum. However, it is clear that the Commission contemplated there would be an
25 Addendum in the nature of that which was subsequently executed at the time it issued Decision No. 61973 approving
the Settlement Agreement.

26 ³ That question is discussed in the Alliance's Brief; and Sempra reserves the right to address it further elsewhere, when
27 substantive issues, as opposed to procedural, and arguments on the merits are under consideration.
28

1 **B. An A.R.S. § 40-252 Proceeding Represents An Appropriate Procedural**
2 **Mechanism For Consideration of APS's Request.**

3 Given the fact that approval of APS's Request for Variance would require a Commission
4 decision rescinding, altering or amending Decision No. 61973, it follows as a matter of logic that
5 a proceeding conducted pursuant to A.R.S. § 40-252 is an appropriate procedural mechanism
6 through which APS's request could be addressed on its merits. The Commission's exercise of
7 discretion and jurisdiction under A.R.S. § 40-252 is governed by consideration of what course of
8 action would be in the "public interest." See, e.g. Arizona Corp. Commission v. Arizona Water Co.,
9 111 Ariz. 74, 523 P.2d 505 (1974); James P. Paul Water Co. v. Ariz. Corp. Com'n, 137 Ariz. 426,
10 671 P.2d 404 (1983). Clearly, the merits of APS's request and all ramifications that might flow from
11 a granting of the same could be examined within the context of the "public interest." Moreover, an
12 A.R.S. § 40-252 proceeding would provide an opportunity for recognition and protection of the
13 rights of persons who might be directly and substantially affected by the end result of such a
14 proceeding.
15

16 However, such a proceeding would be premature unless and until APS has successfully
17 negotiated those amendments to the Settlement Agreement and Addendum which are integral to the
18 ultimate objectives underlying its Request for Variance. The consent of the signatory parties is a
19 prerequisite to such action, and consensual in nature. It cannot be bypassed or ignored. Nor can it
20 be compelled after the fact by a decision issued in a previously commenced proceeding conducted
21 pursuant to A.R.S. § 40-252. In the spirit of "first things first," the consent of the signatory parties
22 should precede the convening of an A.R.S. § 40-252 proceeding to consider APS's request.
23
24
25

1 C. No Further Procedural Events Or Schedule Should Be Established Until The
2 Commission Has Ruled On The Threshold Issue Of Whether APS's Request
3 For Variance Can Be Considered Under A.A.C. R14-2-1614(C).

4 In light of the preceding discussion, Sempra believes that it would be unproductive to
5 establish any further procedural events or dates in the above-captioned proceeding until the
6 Commission has made a threshold determination as to whether APS's request is to be considered
7 pursuant to A.A.C. R14-2-1614(C), or whether it is to be examined in some other procedural setting.
8 Once a Commission decision has been issued on this point, a determination can then be made as to
9 how and when to proceed.
10

11 III.

12 CONCLUSION

13 Accordingly, Sempra hereby requests that the Commission issue a decision concluding that,
14 as a procedural matter, APS's Request for Variance is premature at best for the reasons discussed
15 in Section II(A) and II(B) above. In addition, Sempra further requests that the Chief Administrative
16 Law Judge defer establishing any additional procedural events or dates in the instant proceeding
17 pending the Commission's issuance of such a decision for the reasons discussed in Section II(C)
18 above.
19

20 Dated this 19th day of December, 2001.
21

22 Respectfully submitted,

23
24 By: Lawrence V. Robertson, Jr.
25 Lawrence V. Robertson, Jr.
26 Attorney for Sempra Energy Resources
27

1 Original and ten (10) copies
2 hand-delivered this 19th day of December,
3 2001, to:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
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8 Copy of the foregoing
9 sent via facsimile and mailed
10 this 19th day of December, 2001 to:

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12 Chief Administrative Law Judge
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